Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

JOHN C. NORTON,

Petitioner,

vs.

SAM'S CLUB, WAL-MART CORP., WAL-MART STORES, INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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99PP

QUESTIONS PRESENTED FOR REVIEW:

1. Whether the Court of Appeals exceeded its appellate jurisdiction and/or legal authority by reaching and determining the sufficiency of evidence supporting the jury verdict where Wal-Mart failed to preserve said issue for appellate review in accordance with Rule 50 (b) of the Federal Rules of Civil Procedure?

2. Whether the Court of Appeals, assuming *arguendo* it had jurisdiction and/or authority to reach and determine the issue of the sufficiency of the evidence presented to the jury, nonetheless substituted its own judgment for that of the jury and failed to accord the jury's verdict with sufficient deference given the existence of disputed factual issues as well as issues pertaining to the credibility of witnesses and evidence?

3. Whether the verdict of the jury and the Judgment and Amended Judgment of the trial Court were within the fair province of the jury and the Court to decide and were adequately supported by the evidence, the law, the facts, as well as sound principles of due process of law such that said judgments of the trial Court should be reinstated?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED:

The names of all parties to the proceedings in the Court below whose judgment is sought to be reviewed herein are as set forth in the caption of the case, and are as follows:

1. John C. Norton, Plaintiff-Appellee (Petitioner herein).

2. Sam's Club, Wal-Mart Corp., Wal-Mart Stores Inc., Defendants-Appellants (Wal-Mart)(Respondent herein).

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OPINIONS BELOW:

Attached hereto and made a part hereof, as the Appendix to this Petition for a Writ of Certiorari, are the following opinions and decisions of the lower courts.

1. Initial Judgment of the U.S. District Court, Western District of New York following the jury verdict in favor of the plaintiff entered February 6, 1997. (A1-A2).

2. Amended Judgment of the U.S. District Court granting plaintiff's post-trial motion for attorney's fees and front pay entered May 9, 1997. (A3-A5).

3. Decision and Order of the U.S. District Court granting the plaintiff Attorney's Fees, Front Pay and Costs, entered May 9, 1997. (A6-A14).

4. Decision of the Court of Appeals for the Second Circuit reversing the trial court entered May 29, 1998, printed at 145 F.3d 114. (A15-A24).

5. Mandate issued by the Court of Appeals for the Second Circuit to the Northern District of New York entered July 23, 1998. (A25-A26).

6. Decision of the Court of Appeals for the Second Circuit denying plaintiff's motion for a rehearing and for a suggestion of En

Banc review entered July 16, 1998. (A27-A28).

7. This Court is believed to have jurisdiction to review the judgment in question by a Writ of Certiorari based upon 28 USC 1254 (1), 28 USC 2101 and Rule 10, et seq. of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION:

1. The date of entry of the decision of the Court of Appeals for the Second Circuit which is sought to be reviewed herein is May 29, 1998.

2. The date of entry of the order denying a rehearing and the suggestion for an *En Banc* review is July 16, 1998.

3. The date of entry of the Mandate issued erroneously by the Court of Appeals to the U.S. District Court of the Northern District of New York is July 23, 1998.

U.S. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES and REGULATIONS INVOLVED:

The United States Statutes involved herein are, as follows:

1. The Age Discrimination in Employment Act, as amended, 29 USC 621, 623, 626, 630, 631, et seq.:

2. Federal Rules of Civil Procedure Rule 50 (b).

STATEMENT OF THE CASE:

The review of the judgment of the Court of Appeals for the Second Circuit is sought because that Court has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal dealing with the same matter, i.e. both by reaching the issue of the sufficiency of the evidence in the absence of the appellant "Wal-Mart" preserving said issue for appeal by failing to comply with FRCP Rule 50 (b) and by notwithstanding this failure to preserve said issue on appeal by substituting its judgment for that of the jury.

In addition, the Second Circuit in this case, has also decided important questions of federal law pertaining to both their own appellate jurisdiction and the sufficiency of the evidence in age discrimination in employment actions which are in conflict with the decisions of this Supreme Court of the United States and the Second Circuit Court of Appeals.

Moreover, the Second Circuit Court of Appeals has departed from the accepted and usual course of determining judicial proceedings following the determination by a jury in a fact-based dispute, where the defendant-appellant in the Court of Appeals (i.e., "Wal-Mart"), failed to preserve properly the very issue of sufficiency of the evidence such that the Second Circuit should never have reached this as an issue

for determination.

Also, this Court's powers of supervision of lower court decisions should be exercised in this case because the defendant received a fair trial and fair charge to the jury which Wal-Mart did not object to on appeal. The Jury fairly weighed all of the evidence which was presented to it including making assessments of the credibility of witnesses and decided in the plaintiff's favor in what was entirely a fact-based case. The amount of damages awarded to the plaintiff was both fair and reasonable. Moreover, the failure of the defendant-appellant to preserve properly the issue of the sufficiency of the evidence in accordance with FRCP 50 (b) should have precluded the Court of Appeals from making an adverse determination against said plaintiff on appeal based upon a selective marshaling of the evidence and a substitution of its own judgment for that of the duly constituted unanimous jury in violation of the applicable substantive and procedural laws pertinent hereto.

The basis for federal jurisdiction in the Court of the first instance is the Age Discrimination in Employment Act, 29 USC 621, et seq.

REASONS FOR GRANTING THE PETITION:

ARGUMENT: POINT ONE:

THE COURT OF APPEALS LACKED THE JURISDICTION AND THE LEGAL AUTHORITY TO REACH THE ISSUE OF SUFFICIENCY OF THE EVIDENCE BASED UPON THE FAILURE OF THE APPELLANT TO PRESERVE PROPERLY SAID ISSUE FOR APPEAL BY ITS NOT MAKING A FRCP RULE 50(b) MOTION TO THE TRIAL COURT PRIOR TO APPEAL.

This Court has held that an intermediate appellate court has neither the legal power nor the legal authority to render a determination different and/or contrary to that of the jury verdict in the absence of a timely and proper motion by the appellant seeking in the first instance in the trial court a judgment as a matter of law notwithstanding the verdict. See e.g. Johnson v. New York, New Haven & Hartford R.R., 344 U.S. 48, 50 (1952); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 214-218 (1947); FRCP 50 (b).

By not making such a motion "Wal-Mart" failed to preserve this issue for the underlying appeal and waived its right to have such an argument heard and decided by the intermediate appellate court. This is well settled law in this Court as well as in other intermediate appellate courts and the Second Circuit itself. Please see e.g., Allied Bank-West, N.A. v. Stein, 996 F. 2d

111 (5th Cir.), wherein the Court of Appeals therein stated that such a failure by the appellant to make such a FRCP 50 (b) motion was "virtually jurisdictional." The Second Circuit has noted that in order to preserve an argument that a verdict is against the weight or sufficiency of the evidence a FRCP Rule 50 (b) motion is "mandatory," in that "to preserve for appeal a challenge to the denial of a pre-verdict motion for judgment as a matter of law, a movant must renew that motion after the verdict." (Emphasis added). Please see, Varda, Inc. V. Insurance Co. Of North Am., 45 F. 3d 634, 639 (2d Cir. 1995). In this case, the appellant totally failed to preserve the appellate jurisdiction regarding the sufficiency of the evidence as it failed to make such a post-verdict Rule 50 (b) motion. Appellant failed to make such a motion totally, i.e., either orally at trial or in writing within ten (10) days after trial as prescribed by section 50 (b). Moreover, this appellant even failed to request a new trial following the jury verdict in favor of the plaintiff in this case. Please see the Second Circuit's determination in Borger v. Yamaha Int'l Corp., 625 F.2d 390 394-395 (2d Cir. 1980), wherein that Court held that in the absence of such a motion by the appellant the appellate court was without power to direct the District Court to enter judgment contrary to the one which the District Court permitted to stand.

It obviously makes good sense to

require such a post-verdict motion at the trial stage of the proceedings in order to permit the trial judge who viewed the evidence first-hand an opportunity to address the jury verdict and any issues pertaining to the sufficiency of the evidence which went to the jury at a stage in the proceedings before appellate jurisdiction is invoked. As this Court and the Second Circuit has held, such a motion by the appellant is more than a mere "formality." Borger, supra; Cone, supra. The failure on the part of Wal-Mart to make such a motion creates a situation where appellate jurisdiction should not have been invoked to address an issue which was not presented to the trial court and not preserved for appeal. As aforesaid, this is a matter of well settled law in all of the Courts which have addressed this issue including this Supreme Court of the United States.

Moreover, the fatal error herein is totally that of Wal-Mart and in no way was the fault of the plaintiff who was satisfied with the results of the jury's verdict.

In this case it is respectfully submitted that the Second Circuit's reversal of the jury verdict by substituting its own judgment as to the sufficiency of the evidence for that of the jury, at all, and in the absence of such a Rule 50 (b) motion by the defendant, has further been exacerbated by the intermediate appellate

court's attempt to blame the plaintiff-appellee for waiving such an issue when absolutely none of the cases upon which that Court relies upon requires an appellee to raise or preserve such an issue on appeal.

It is respectfully submitted that the well settled law on this point is as it should be that the appellee is under no obligation to preserve this issue, but rather it is the obligation of the appellant only under Rule 50 (b), if it wants an appellate review of the sufficiency of the evidence, to preserve properly this issue for appeal by making a Rule 50 (b) motion. This "Wal-Mart" totally failed to do, in this case, as aforesaid.

Equally importantly, it is respectfully submitted that it is fundamentally improper to reward the party who failed to preserve the issue it seeks appellate review on (i.e. Wal-Mart) and to punish the plaintiff-appellee who won a jury verdict on a fair preponderance of the evidence because according to the Second Circuit, the appellee's brief only briefly "mentioned" this failure by the appellant. For the Second Circuit to overlook the fatal defect of the appellant who failed to make the Rule 50 (b) motion at all and to blame the appellee for only "casually" mentioning it as a grounds not only to reach this issue but to decide it against the plaintiff is palpably unfair and violates basic notions of fundamental fairness and due process of

law.

The Second Circuit, in an argument raised for the first time by the appellant on appeal, substituted its judgment for that of a duly constituted Jury. Such a result flies in the face of well settled procedural as well as substantive law, is not in conformity with the prior decisions of this Court, other Courts of Appeal, nor the Second Circuit itself. Cone, supra; Varda, supra.

Notwithstanding the Second Circuit's flawed reasoning, it must also be noted that the Second Circuit is simply wrong because the plaintiff-appellee properly raised this issue in its brief to the intermediate appellate court, which it had no obligation to do in any event. That Court's jurisdiction is not an issue which the appellee can either bestow or waive. Moreover, there was no cross-appeal in this matter wherein the appellee was seeking relief other than the mere affirmance of the trial court based upon a jury verdict rendered in its favor. The Second Circuit, it is respectfully submitted, has tortured the reasoning which requires that the party seeking relief on an issue such as the sufficiency of the evidence following the rendering of a jury verdict against it is required to preserve such an issue for appeal by following the relatively simple and straightforward statutorily prescribed procedure of making the proper Rule 50 (b)

motion in the trial court before an appeal on such an issue can be had.

The Second Circuit Court of Appeals has erroneously stretched the law with respect to FRCP 50(b) beyond its reasonable interpretation to save the wrongdoer, who according to the jury wrongfully discriminated in this case, and who procedurally failed to preserve its appellate arguments and is the only party that has truly waived its rights in this regard.

Wal-Mart received a proper Charge on the law and a fair trial. The burdens of proof were properly explained to the jury by the trial judge and they rendered a fair and reasonable verdict in favor of the plaintiff. The only significant procedural error which occurred herein was that of Wal-Mart, itself. That is, Wal-Mart failed to make a post-trial motion in accordance with FRCP 50 (b).

The appellant in the Second Circuit, Wal-Mart, should not be rewarded for its errors, for its failure of proof, and for its failure to convince the jury by the complete and utter creation of an non-meritorious fiction of a so-called waiver by the appellee when no such waiver either occurred or was intended.

It is respectfully submitted that such a result flies in the face of the law, the

facts of this case, and fundamental due process of law and justice. This Court should rectify the error of the intermediate appellate court and either grant this petition for a Writ of Certiorari or reinstate the amended judgment in the trial court below.

POINT TWO:

THE COURT OF APPEALS MISAPPREHENDED ITS ROLE IN NOT PROPERLY DEFERRING TO THE JURY ON FACTUAL MATTERS AND MATTERS PERTAINING TO ASSESSING THE CREDIBILITY OF WITNESS WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE JURY WHEN ADEQUATE BASIS EXISTED VIEWING THE RECORD AS A WHOLE IN A LIGHT MOST FAVORABLE TO SUPPORT THE JURY'S VERDICT.

It is respectfully submitted that the decision of the Second Circuit which substituted its judgment on appeal for that of a duly constituted unanimous jury is especially egregious in this case where, as aforesaid, the appellant in that Court failed to even preserve properly its own appellate arguments by making a post-verdict motion in accordance with the Federal Rules.

The ADEA provides for Jury verdicts in fact-based cases such as this one involving circumstantial evidence of age discrimination as this one clearly does. It certainly cannot be said, as the Court of Appeals has apparently decided, that as a matter of law, that no reasonable jury could have determined all of the evidence before it in favor of the plaintiff as this jury did. Cf. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

The Court of Appeals has reached a bizarre result which is inconsistent with the law and totally out of sync with itself

in other cases, the decisions of other Circuit Courts of Appeal, as well as the Supreme Court of the United States.

A manifest injustice has been created when the Court of Appeals can say that Wal-Mart's conduct in this case may be considered to be an affront to dignity, offensive, indecent, wrong, wicked, or even stupid but that based upon the Court of Appeals own tortured reasoning and selective marshaling of the evidence that such conduct, notwithstanding the unanimous verdict of the jury to the contrary, is not discriminatory. Said reasoning obviously flies in the face of the jury's province and the sound determination about this exact issue which was made by the jury, as the sole trier of fact, after seeing and hearing all of the witnesses and assessing their credibility. Postal Service Bd. of Governors v. Aiken, 460 U.S. 711, 716 (1983); Luciano v. Olsten Corp., 110 F. 3d 210, 215 (2d Cir. 1997).

Moreover, the Court of Appeals' reasoning apparently fails to recognize that these factual issues are not mutually exclusive. That is, it can well be said in this case that the conduct of the defendant-appellant, Wal-Mart, herein was not only stupid, indecent, offensive, an affront to dignity, wrong and wicked but that it was also *discriminatory* as well. That is what this jury decided and such a determination by the jury stands in uniformity with all

the evidence and all of the reasonable inferences to be drawn therefrom. The Court of Appeal's contrary decision which selectively marshals only some but not all of the facts does not. Cf. Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997).

Moreover, the Court of Appeals had before it evidence in the record which the jury did not have such as age derogatory comments made by the plaintiff's supervisors which the plaintiff testified to in a pre-trial affidavit but which evidence was not heard by the jury. Even absent hearing this evidence the jury reached the verdict which it did in favor of the plaintiff and against the defendant. Viewing the entire *Record* as a whole in a light most favorable to the plaintiff, which the Court of Appeals should have done, had the issue of the sufficiency of the evidence been properly preserved by Wal-Mart, which it was not, provided more than adequate basis to support the jury's determination herein.

This Court should support the jury verdict which agreed in favor of the plaintiff by a unanimous 8-0 vote.

Even if one were to concede that the evidence in this case could have gone either way, based upon the jury's determination, it is not true that this Court or the Second Circuit could find that no reasonable jury could have found the way this jury did. This Court would do a disservice to the law

and to our system of justice by overlooking all of the facts in this case, as well as the procedural errors committed by the defendant-appellant Wal-Mart, by upholding the erroneous determination made by the intermediate appellate court. See, e.g., Woroski v. Nashua Corp., 31 F. 3d 105 (2d Cir. 1994).

The intermediate appellate court totally failed to credit the plaintiff with a view of the evidence in a light most favorable to him when it ignored several important points which a jury could properly have considered as evidence of discrimination which obviously the intermediate appellate court did not. Stratton v. Department of Aging, 132 F. 3d 869 (2d Cir. 1997); Woroski, supra.

For example, the evidence testified to by a disinterested former employee of Wal-Mart, a Mr. Joseph Pasnak, demonstrated that the senior manager that was present when Mr. Norton was terminated was also present in the State of Maine when Mr. Norton again was sought to be made a negative example of, as the eldest employee present at that time, and for no other apparent reason, as testified to by Mr. Pasnak, except for his age. The evidence that said senior manager who was also present in the Henrietta, N.Y. store when Mr. Norton was terminated could have been properly credited by the jury as a further supportive factor weighing in favor of the position of the plaintiff. It

obviously was not even considered by the Court of Appeals.

Also, this Court should be aware that when the plaintiff's store manger, Mr. Rexrode, testified at trial, on more than one occasion under cross-examination, he appeared less than truthful. His character, demeanor and veracity in general were for the jury to determine and these are additional proper reasons why the verdict should not have been disturbed. In any case and certainly a close case, assuming this one was, credibility is obviously a key ingredient. Here, the defendant's witness suffered from a lack of credibility. While this might not have been known by the Court of Appeals because it was not present at the trial to make these judgments, it should not be overlooked by this Court at this time. It is also a key reason why a FRCP Rule 50 (b) motion is required to be made to the trial court before appellate jurisdiction attaches to an issue of sufficiency of the evidence.

The assessments of the jury should be paramount in a case such as this. These are additional reasons why this Court should apply the well-settled law of deferring to the determination of disputed fact based issues under the ADEA, as elsewhere, under federal law, to the jury's determination, which in this case was a unanimous jury determination of 8-0 in favor of the plaintiff.

At the very least, it is respectfully submitted that a new trial should be ordered so that all of the testimony and evidence can be presented to jury, although it is the petitioner's primary position herein that this verdict should be reinstated and the Second Circuit Court of Appeals decision of May 29, 1998 should be reversed.

POINT THREE:

THE VERDICT OF THE JURY AND THE JUDGMENT AND AMENDED JUDGMENT OF THE TRIAL COURT WERE WITHIN THE FAIR PROVINCE OF THE JURY AND THE TRIAL COURT TO DECIDE AND WERE ADEQUATELY SUPPORTED BY THE EVIDENCE, THE LAW, THE FACTS, AS WELL AS SOUND PRINCIPLES OF DUE PROCESS OF LAW SUCH THAT SAID JUDGMENTS OF THE TRIAL COURT SHOULD BE REINSTATED.

Under our system of justice and under the ADEA, the verdict of the jury should be allowed to stand. Stratton v. Department of Aging, supra.

The plaintiff proved at trial in this case that the issues of age were prevalent throughout the employment of the plaintiff at Sam's Club, "Wal-Mart." The intermediate appellate court misapprehended or overlooked critical facts and all of the testimony in favor of the plaintiff in their decision in this case.

Further support for the verdict exists in that the Court of Appeals failed to give cognizance or even mention that the Plaintiff testified at trial that when he was hired age was made a factor in the company's determination to hire him as a so-called older, more mature individual who could relate to the corporate individuals and executives that he was going to be asked to sell Sam's Club corporate memberships to.

Moreover, the Court of Appeals failed to give recognition to the reasonable inferences to be drawn by the jury that the facts of this case made it clear that the only persons hired and promoted into positions of management and supervision in the Rochester/Henrietta, N.Y. store where the plaintiff was employed were significantly younger individuals than was the plaintiff. The discrepancy in ages between management that made the termination decision and employees such as the plaintiff who were terminated should have been a factor which the Court of Appeals credited towards the support of the verdict of the jury rather than ignore, distinguish or belittle it. See, e.g., O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. ____, 134 L. Ed. 2d 433 (1996).

Also, the Court of Appeals failed to give any recognition to the weak statistical evidence in this case, as produced by the defendant themselves. That is, the defendant's store manager testified that defendant's management was aware of the plaintiff's age as well as the ages of all other employees by reason of their own record-keeping. More importantly, the jury could properly have rejected the defendant's arguments concerning the statistical amount of employees over the age of 40, which proof backfired against the defendant upon cross-examination, when the defendant's so-called statistical evidence revealed that only 13% of their whole staff was over 40 years of

age.

The Court of Appeals should have deferred to the jury in this regard and permitted the jury to use its own common knowledge and common sense in assessing this evidence. The Court of Appeals failed to consider this evidence at all in its reversal. The plaintiff argued at trial that even without a statistician which the defendant failed to produce the jury should have been able to use its own common experiences and common sense to assess the significance or the lack thereof of the defendant's proof, in favor of the plaintiff. because of the relatively paltry size of the defendant's over-40 population in its workforce in the Rochester store from which the plaintiff was terminated. That is, that such a relatively paltry-sized over-40 population in its Rochester/Henrietta store reflected a much smaller percentage than that of the workforce in general, particularly in the Rochester, N.Y. area, where this case was tried and where the jury's common sense should be have been permitted to prevail. Stratton v. Department of Aging, supra. An inference of age discrimination by the jury was properly permissible on this evidence.

Equally important, the facts of this case revealed that the only person that was ever covertly trailed by the plaintiff's store manager, Mr. Rexrode, in the type of under-cover surveillance as involved herein

was the plaintiff himself. As the proof indicated, the plaintiff was one of the eldest, if not the eldest, employees in the defendant's store at the time he was terminated. No one under the age of 40 was ever terminated for any reason even remotely suggesting such a similar treatment or was ever covertly surveilled.

This fact alone, and certainly in addition to all of the other facts which the Court of Appeals failed to consider or credit to the plaintiff, properly demonstrated that the jury could very reasonably have decided that the management of Sam's Club in Henrietta, N.Y. treated Mr. Norton differently from its other employees because of his age.

This was the very task which was fairly and properly charged to the jury for its determination and which the jury deliberated upon and reached a verdict in favor of the plaintiff. The jury could have and apparently did consider this as evidence of age discrimination. It is submitted that the Court of Appeals in failing to give any cognizance to this proof and erroneously describing the plaintiff's proof as constituting "thin air" violated the plaintiff's rights to have his case heard and determined by a jury of his peers and violated his rights to avail himself of the remedial provisions of the ADEA and the right to not only a have a trial by jury, as set forth thereunder, but to have the

determination of the jury respected and upheld.

As previously mentioned, the facts of this case revealed that the only persons that were ever terminated by Mr. Rexrode for the so-called reasons involved herein were over the age of 40, i.e., the plaintiff and one other. Mr. Rexrode, himself an individual in his mid-20's at the time of this incident, never terminated a younger individual on such a basis as the facts involved herein demonstrated. This reveals at least a circumstantial case of different and discriminatory treatment for employees over the age of 40 from that of employees under the age of 40 which the Jury could properly have considered. Woroski, supra; Stratton, supra.

Thus, as set forth in this Petition and throughout this Plaintiff's case in general, much more than "thin air" was involved in this matter. Sufficient evidence under the ADEA exists to support and reinstate this jury verdict. This Court should grant this Writ of Certiorari, as requested herein, and reverse the decision of the Court of Appeals.

CONCLUSION:

It is respectfully requested that this Court grant the Petition for a Writ of Certiorari to review the determination of the Court of Appeals for the Second Circuit, or in the alternative reinstate the amended judgment of the U.S. District Court, or in the alternative to grant a new trial, and for such other and further relief as to the Court may seem just and proper.

DATED: September 7, 1998

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APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JOHN C. NORTON,

Plaintiff(s),

V. **JUDGMENT IN A CIVIL CASE**

SAM'S CLUB, WAL-MART CORP.,

Defendant(s).

CASE NUMBER: 93-CV-6387T

X **Jury Verdict.** This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury finds in favor of the plaintiff in the amount of $30,000.00

February 6, 1997 RODNEY C. EARLY
Date Clerk

s/Leigh Ann Lester
(By) Deputy Clerk

FILED
97FEB-6 PM 3:15
U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Norton

(Plaintiff(s)

v. 6:93-cv-06387

Sam's Club

Defendant(s)

PLEASE take notice of the entry of a JUDGMENT filed on 5/9/97, of which the within is a copy, and entered 5/9/97 upon the official docket in this case. (Document No. 34.)

Dated: Rochester, New York
May 9, 1997

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO: Theodore S. Kantor, Esq.
Michael J. Kanaley, Jr., Esq.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JOHN C. NORTON,

Plaintiff(s),

V.

AMENDED JUDGMENT IN A CIVIL CASE

SAM'S CLUB, WAL-MART CORP., WAL-MART STORES, INCORPORATED,

Defendant(s).

CASE NUMBER: 93-CV-6387T

X **Jury Verdict.** This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury finds in favor of the plaintiff in the amount of $30,000.00. Plaintiff is entitled to attorney's fees of $12,000; front pay of $25,000; costs of $355.02

for a total judgment of $67,355.02 plus interest.

May 9, 1997

RODNEY C. EARLY
Clerk

s/Leigh Ann Lester
(By) Deputy Clerk

FILED
97MAY-9 PM 4:09
U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER

34

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Norton

Plaintiff(s)

v. 6:93-cv-06387

Sam's Club

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 5/9/97, of which the within is a copy, and entered 5/9/97 upon the official docket in this case. (Document No. 33.)

Dated: Rochester, New York
May 9, 1997

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO: Theodore S. Kantor, Esq.
Michael J. Kanaley, Jr., Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN C. NORTON,

Plaintiff, **DECISION and ORDER**

v.

93-CV-6387T

SAM'S CLUB, WAL-MART CORPORATION

Defendant.

INTRODUCTION

Plaintiff John C. Norton brought suit against the defendant Sam's Club, Wal-Mart Corporation alleging violations of the Age Discrimination in Employment Act, ("ADEA"), and the New York State Human Rights Law. The case came to trial on February 4, 1997, and on February 6, 1997, the jury returned a verdict in favor of the plaintiff in the amount of $30,000.00. On February 7, 1997, plaintiff moved for an award of front pay pursuant to the ADEA, attorney's fees, and costs. While that motion was pending and on April 22, 1997, plaintiff obtained a writ of execution against the defendant to collect the $30,000.00 judgment plus interest. Upon

being served with the writ of execution, defendant moved for an Order: (1) quashing the writ as void for failure to name the proper party; (2) staying all attempts to execute on the judgment; and, (3) temporarily restraining the Monroe County Sheriff's Department from transferring to the plaintiff $32,524.77 "seized" from Wal-Mart pursuant to the writ. On May 6, 1997, plaintiff cross-moved to amend the judgment to name Wal-Mart Stores, Inc. as the defendant.

For the reasons set forth below, I hereby grant plaintiff's motion for an award of attorney's fees, costs, and front pay, and award plaintiff $12,000.00 in attorney's fees, $355.02 in costs, and $25,000.00 in front pay. Additionally, I grant plaintiff's motion to amend the judgment. I deny defendant's motion to quash, and for a temporary restraining order. Finally, I grant defendant's motion for a stay of the proceedings to execute on the judgment.

DISCUSSION

I. Attorney's Fees

The ADEA provides that a prevailing plaintiff may be entitled to reimbursement for reasonable attorney's fees. 29 U.S.C. § 626(b). Plaintiff moves for attorney's fees

in the amount of $14,925.00, representing 99.5 hours of legal work at $150.00 per hour. Defendant objects to plaintiff's documentation of the legal work claimed to have been performed as vague, and undetailed. Additionally, defendant alleges that some charges are duplicative. A review of the billing records indicates that some charges, including charges related to plaintiff's attempts to receive unemployment insurance and response to the court's Order to Show cause why the case should not be dismissed for failure to prosecute, are unwarranted to purposes of determining attorney's fees awardable in this litigation. Moreover, the records are somewhat vague in that many entries cover extended periods of time, in one instance lasting as long as four months. Taking into account the unwarranted charges and the vagueness of the records, I find that a 20% reduction of plaintiff's request for attorney's fees is warranted, and that plaintiff is entitled to an award of $12,000.00 for legal expenses incurred.

II. Costs

Rule 54(d) of the Federal Rules of Civil Procedure provides in relevant part that costs other than attorney's fees may be awarded to the prevailing party unless otherwise directed by the court. Plaintiff, as the

prevailing party in this action, is entitled to costs, and accordingly, I grant plaintiff's motion for an award of costs in the amount of $355.02.

III. Front Pay

Pursuant to the ADEA, a plaintiff that has proven his case of age discrimination may be entitled to damages of front pay. 29 U.S.C. § 626 (West 1985). The trial court awards front pay in lieu of reinstatement. Rose v. Ireco, Inc., 872 F.Supp. 1127, 1135 (N.D.N.Y. 1994). Such an award may not be unduly speculative, and must be reduced to the extent that damages could have been mitigated. Id. (citations omitted).

In the instant case, plaintiff was earning approximately $17,000.00 per year while employed at Wall-Mart. Plaintiff, who is now 60, has represented through his attorney that he expected to work five more years. Accordingly, plaintiff, had he continued to work at Wall-Mart, would have earned approximately $85,000.00 over the next five years, plus any wage increases he would have received during that time. Plaintiff, however, has an obligation to mitigate those damages. Plaintiff worked as a telemarketer for Wal-Mart. Had plaintiff taken a similar position, many of which are generally

available in the local economy, he would have been able to significantly mitigate his damages. Even if plaintiff had remained at the temporary job that he took for four months after he was terminated, he would have reduced his damages by $60,000.00. See Trial Transcript at p. 48. (plaintiff testifying that he earned approximately $4,000.00 in four months at a temporary job after being terminated from Wal-Mart). I find that plaintiff could have mitigated his damages by at least $60,000.00, and accordingly, award plaintiff front pay damages of $25,000.00.

IV. Plaintiff's Motion to Amend the Judgment

Plaintiff moves to amend the judgment to correct the name of the defendant. Throughout the entire of this action, defendant was referred to as "Sam's Club, Wal-Mart Corporation." However, the writ of execution obtained by plaintiff named "Wal-Mart Stores, Inc." as the party liable for the judgment. Defendant argues that the writ is void for failure to name the proper party. Plaintiff moves to amend the judgment to include Wal-mart Stores, Inc. as a defendant, and thus conform the judgment to the writ.

I grant plaintiff's motion to amend. The amendment is a technical one, and no

party will be prejudiced by it. Wal-Mart Stores, Inc. appeared in and defended this action and accordingly had notice of the action and the judgment that was rendered by the jury.

V. Defendant's Motions

A. Motion for a Stay of Proceedings to Enforce the Judgment.

Defendant moves to stay execution on the judgment pending resolution of plaintiff's motions for attorney's fees, costs and front pay. Because I have decided those issues in this Decision and Order, such a stay is unnecessary. However, because I direct that the judgment be amended, I hereby Order a stay of all execution proceedings for ten days from the date of this decision to afford the defendant the opportunity to satisfy the total judgment in accordance with this decision without the necessity of implementing further enforcement remedies. If defendant fails to satisfy the amended judgment during that time, plaintiff may proceed with enforcement remedies to collect the judgment as provided by this Decision and Order.

B. Motion for a Temporary Restraining Order

Defendant moves for an Order temporarily restraining the Monroe County Sheriff's Department from transferring funds collected (in the amount of $32,524.77) from Wal-Mart Stores, Inc. to the plaintiff. I leave it to the parties to determine whether the amount may be transferred to the plaintiff as partial payment of the judgment as provided in this decision and order.

C. Motion to Quash

Defendant moves to quash the writ of execution on grounds that it names an improper party as the party responsible for the judgment in this action. The error, if any, in the writ of execution is a technical defect that is cured by plaintiff's motion to amend the judgment, which I have granted. Therefore, in accordance with Section IV above, I deny defendant's motion to quash the writ of execution.

CONCLUSION

Plaintiff's motion for attorney's fees, costs, and front pay is granted. Additionally, plaintiff's motion to amend the judgment is granted. Accordingly, I direct the Clerk of the Court to amend the Judgment to include the following amounts: jury verdict of February 6, 1997 - $30,000;

attorney's fees of $12,000; front pay of $25,000; costs of $255.02 for a total of $67,355.02 plus interest and to add "Wal-Mart Stores, Incorporated" as a defendant. Defendant's motion to quash and for a temporary restraining order is denied. I grant however, defendant's motion to stay execution proceedings for ten days from the date of this decision and order. If defendant fails to satisfy the amended judgment during that time, plaintiff may proceed with any enforcement remedies to collect the judgment.

ALL OF THE ABOVE IS SO ORDERED.

s/Michael A. Telesca
Honorable Michael A. Telesca
United States District Judge

DATED: Rochester, New York
May 9, 1997

FILED
97 MAY - 9 PM 3:03
U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: April 7, 1998 Decided: May 29, 1998)

Docket No. 97-7928

JOHN C. NORTON,

Plaintiff-Appellee,

—v.—

SAM'S CLUB, WAL-MART CORP., WAL-MART STORES, INC.,

Defendants-Appellants.

Before:

WINTER, *Chief Judge*,
MCLAUGHLIN, and CALABRESI, *Circuit Judges*.

Appeal from the United States District Court for the Northern District of New York (Michael J. Telesca, *Judge*). An employee sued his former employer, alleging discrimination

in violation of the Age Discrimination in Employment Act. The jury returned a verdict in favor of the plaintiff.

Reversed.

MICHAEL J. KANALEY JR., Kenney, Kanaley, Shelton & Liptak, L.L.P., Buffalo, NY, *for Defendants-Appellants*.

THEODORE S. KANTOR, Bilgore, Reich, Levine, Kroll & Kantor, Rochester, NY, *for Plaintiff-Appellee*.

CALABRESI, *Circuit Judge*:

Plaintiff John C. Norton sued Sam's Club, claiming that he had been fired because of his age in violation of the New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 296 *et seq.* (McKinney 1993 & Supp. 1997), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The case went to a jury, which returned a verdict in favor of Norton and awarded him $30,000 in back pay. The court (Michael J. Telesca, *Judge*) thereupon granted him an additional $25,000 in front pay as well as attorney's fees and court costs of $12,355.02. Sam's Club appeals, arguing that the evidence at trial was insufficient to support the jury's verdict in favor of Norton. We agree, and reverse.

I. FACTS & PROCEDURAL HISTORY

Sam's Club, a division of Wal-Mart, offers discount merchandise to individuals who buy memberships in the "club." Norton's job was to sell corporate memberships to executives of companies in the area around the Henrietta, New York, Sam's Club warehouse. When Norton was hired by Sam's Club in January 1991, he was fifty-three years old.

In January of 1993, Norton's manager, Ronny Rexrode, became concerned about Norton's productivity. Rexrode decided to spend a day trailing Norton while Norton was out making sales calls. Rexrode observed Norton spending approximately an hour at lunch with co-workers. Norton, however, marked only a thirty minute lunch break on his time card for that day. Rexrode considered this a "theft of time" and confronted Norton. Norton admitted that he had spent a long time at lunch that day, but denied that he had done anything wrong. He explained that he had been very upset because he had just learned that his elderly father was terminally ill, and that his co-workers had taken him out to lunch to cheer him up.

Rexrode nevertheless decided to fire Norton. Norton had previously been subject to disciplinary action for failing to follow Sam's Club procedures for making a sales appointment. As a result of that incident, he had been given a "decision day," which amounts to a day off with pay during which the employee is to deliberate on his actions and consider his future with the company. In addition, as previously noted, Rexrode had been dissatisfied with Norton's productivity. Rexrode indicated that Norton's "theft of time," combined with these factors, led him to dismiss Norton.

One of the other employees who had been at lunch with Norton, Richard Croce, was also fired for falsifying his time

card. But two others who were at the long lunch, Joel Kasdin and Rick Seibert, were not dismissed. Although their time cards likewise indicated that they had taken only a half-hour lunch, their cards had been marked in error by their supervisor, rather than by Kasdin and Seibert themselves. As a result, they were not held responsible for the misstatement. Croce, Kasdin, and Seibert were all over forty years of age at the time of Norton's termination.

Norton contends that he was fired because of his age. In support of this position at trial, he pointed to the fact that Rexrode and most of the other Sam's Club managers were in their twenties and thirties, while Norton and the other person fired, Croce, were over forty. In addition, Norton testified that he was the oldest person present at a recent sales conference and that he was the only person sent home early from the conference. Finally, he suggested that the main reason given by Sam's Club to explain his termination—his "theft of time" on one occasion—was so inherently implausible that it had to be pretextual.

Sam's Club moved for judgment as a matter of law ("JMOL") at the close of the plaintiff's case and again at the conclusion of all the evidence. The case went to the jury, which returned a verdict for Norton. Sam's Club did not renew its JMOL motion after the verdict.

II. DISCUSSION

On appeal, Sam's Club argues that the evidence was insufficient to support a finding of age discrimination and that the jury's verdict must therefore be reversed. We agree. But before we discuss the merits of this argument, we deem it appropriate to consider a procedural irregularity in the case.

A. Procedural Matters

Sam's Club moved for judgment as a matter of law at the close of the plaintiff's case. It failed, however, to renew that motion after the jury returned its verdict. Under ordinary circumstances, this would present a significant problem for Sam's Club on appeal. We have held that "[t]o preserve for appeal a challenge to the denial of a pre-verdict motion for judgment as a matter of law, a movant must renew that motion after the verdict." *Varda, Inc. v. Insurance Co. of North Am.*, 45 F.3d 634, 638 (2d Cir. 1995). And when a party does not make a renewed motion for JMOL after the verdict pursuant to Federal Rule of Civil Procedure 50(b), that party is deemed not to have preserved its challenge to the sufficiency of the evidence. *See id.*

In the case before us, however, the appellee has not properly preserved *his* right to object to the appellant's attempt to claim insufficiency of the evidence. While the preliminary section of Norton's brief mentions in passing that Sam's Club did not make a post-verdict motion for JMOL, it attributes no significance to that fact. Federal Rule of Appellate Procedure 28(b) requires that the appellee's brief contain a summary of argument, an argument, and, where the appellee is dissatisfied with appellant's statement of the issues, a statement of issues as perceived by the appellee. Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal. *See Frank v. United States*, 78 F.3d 815, 832-33 (2d Cir. 1996), *vacated on other grounds*, 117 S. Ct. 2501 (1997).

Pursuant to this rule, we have held that an argument made only in a footnote was inadequately raised for appellate review. *See United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). And we have concluded that merely incorporating by reference an argument presented to the district

court, stating an issue without advancing an argument, or raising an issue for the first time in a reply brief likewise did not suffice. *See Frank*, 78 F.3d at 833 (collecting cases).[1]

We think that the appellee's casual reference to the appellant's failure to make a post-verdict JMOL motion is insufficient to command the invocation of the rule of *Varda*. While the making of a renewed JMOL motion is mandatory, it is not jurisdictional. As a result, it can be waived, and, absent a request by the appellee, we have no duty to enforce the *Varda* requirement.[2]

Accordingly, we consider the merits of appellant's request for judgment as a matter of law.

B. Sufficiency of the Evidence

We will upset a jury verdict only if there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Stratton v. Department for the Aging*, 132 F.3d 869, 878 (2d Cir. 1997) (internal quotation marks and citation omitted). We must view the evidence in the light most favorable to the party in whose favor the verdict was rendered, giving that party the benefit of all reasonable inferences that the jury might have drawn in his favor. *See id.* And we may not "assess the weight of conflicting evidence, pass

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[1] This rule is, of course, tempered in *pro se* cases by our duty to construe liberally papers filed by *pro se* litigants. But in the case before us, the appellee is represented by counsel.

[2] Even under *Varda*, the appellate court, which is precluded from ordering a JMOL, may nevertheless order a new trial in the absence of a post-verdict motion if it concludes that letting the verdict stand would result in "manifest injustice." *See Varda*, 45 F.3d at 638. But, since appellee has waived his challenge, we need not decide whether that would be appropriate in the case before us. We note, however, that manifest injustice has been found where a plaintiff "failed to prove one of the four essential elements of [his claim.]" *Russo v. New York*, 672 F.2d 1014, 1022 (2d Cir. 1982).

on the credibility of the witnesses, or substitute [our] judgment for that of the jury." *Id.* (internal quotation marks and citation omitted). A party seeking to overturn a verdict based on the sufficiency of the evidence bears a very heavy burden. We believe that Sam's Club has met that burden.

In order to establish a prima facie of age discrimination, the plaintiff must show (1) that he was in the protected age group; (2) that he was qualified for the position; (3) that he was discharged; and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination. *See, e.g., Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). "The burden of establishing a prima facie case is not onerous, and has been frequently described as minimal." *Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997) (per curiam); *see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

Once the plaintiff has established a prima facie case, the defendant has the burden of producing " 'reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.' " *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 559 (2d Cir. 1997) (quoting *St. Mary's*, 509 U.S. at 507). "If the defendant meets its burden of producing an age-neutral reason for the discharge, the presumption of discrimination raised by the prima facie case 'drops out of the picture.' " *Id.* at 559-60 (quoting *St. Mary's*, 509 U.S. at 511); *see Fisher v. Vassar College*, 114 F.3d 1332, 1336 (2d Cir. 1997) (in banc). The burden then returns to the plaintiff, who must adduce sufficient evidence to allow a rational fact finder to infer that the employer was motivated in whole or in part by age discrimination. *See Fisher*, 114 F.3d at 1336. In doing this, the plaintiff is entitled to rely "on the evidence constituting the prima facie case, together with supportable inferences to be drawn from the false or erroneous character

of the employer's proffered reason for the adverse action." *Id.* at 1333.

The thick accretion of cases interpreting this burden-shifting framework should not obscure the simple principle that lies at the core of anti-discrimination cases. In these, as in most other cases, the plaintiff has the ultimate burden of persuasion. *See St. Mary's*, 509 U.S. at 507 (" 'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' ") (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *Fisher*, 114 F.3d at 1333 ("[A] plaintiff in a discrimination case must show by a preponderance of the evidence that the reason for the adverse employment action was illegal discrimination.").

The plaintiff is not required to produce direct evidence of discrimination. *See Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997). In this, as in other, areas of the law a case may be built entirely out of circumstantial evidence. *See, e.g., Burger v. New York Inst. of Tech.*, 94 F.3d 830, 833-35 (2d Cir. 1996) (finding a jury question in an age discrimination case based wholly on circumstantial evidence); *cf. United States v. Viola*, 35 F.3d 37, 44 (2d Cir. 1994) ("Participation in [a] conspiracy can be shown wholly through circumstantial evidence . . . ."). Indeed, plaintiffs in discrimination suits often must rely on the cumulative weight of circumstantial evidence, since "[a]n employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent." *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991); *see also Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Luciano*, 110 F.3d at 215. And we have rejected "the view that circumstantial evidence is inherently weaker than direct evi-

dence." *United States v. Sureff*, 15 F.3d 225, 229 (2d Cir. 1994). For, as we have explained:

> The entry into a house by a person wearing a wet raincoat and holding a wet, open umbrella may well be more reliable evidence of the climate than statements of a person inside the house looking out a window. . . . Circumstantial evidence is thus not a disfavored form of proof.

Id.

Moreover, it is primarily the province of the jury to determine what inferences can be drawn from circumstantial evidence. So long as the evidence can reasonably support an inference of discrimination, the court should not upset the jury's decision. *Cf. Gallagher v. Delaney*, 139 F.3d 338, ___, No. 97-7726, 1998 WL 119614, at *2 (2d Cir. Mar. 19, 1998) ("Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle . . . dynamics of the workplace . . . .").

At the same time, however, a jury cannot infer discrimination from thin air. And thin air is all the plaintiff has produced in the case before us. Norton proved (1) that he was over forty years old when he was fired; (2) that the person who fired him was under forty years of age; and (3) that one other person who was fired around the same time as Norton was also over forty. Norton further suggested that the principal reason offered by Sam's Club for his dismissal (his having taken one long lunch) was preposterous.

Norton established, at best, an *extremely* weak prima facie case. It is not infrequent that people who are dismissed are fired by managers who differ from them in some respect—managers who are younger or older, or of a different race or

gender. If that fact, without more, could suffice to support the finding of discrimination in the instant case, it would be hard to imagine a termination that could not be attributed to discrimination. And even if the jury could find that the explanation offered by Sam's Club for why it fired Norton was absurd, it is hard to see how this would add much of significance to Norton's case. *See Fisher*, 114 F.3d at 1345. Norton's very weak prima facie case, combined with an at best highly dubious showing of pretext, that in itself does not implicate discrimination, is simply not enough to support the jury's conclusion that he was fired because of his age.

At the same time, it is easy to see how a reasonable person could conclude from the facts of this case that it was *wrong* for Sam's Club to fire Norton. Many people would consider it an affront to their dignity to be secretly trailed by a supervisor as they went about their work. And firing someone for taking a long lunch on a day when he was coping with serious family problems might seem to some to be unduly harsh. But the ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for *discriminating*, for firing people on account of their age. The record in the instant case is devoid of evidence, direct or circumstantial, sufficient to support a finding that Sam's Club fired Norton because of his age. Accordingly, we REVERSE.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 29th day of May, one thousand nine hundred and ninety-eight.

BEFORE: Hon. Ralph K. Winter
Chief Judge
Hon. Joseph M. McLaughlin
Hon. Guido Calabresi
Circuit Judges

Docket No. 97-7928

JOHN C. NORTON,

Plaintiff-Appellee

-v-

SAM'S CLUB, WAL-MART CORP., WAL-MART STORES, INC.,

Defendant-Appellants.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED and DECREED** that the judgment of said district court be and it hereby is reversed in accordance with the opinion of this court.

FOR THE COURT
George Lange III, Clerk
By:

s/Beth J. Meador
Beth J. Meador
Administrative Attorney

A True Copy
George Lange III, Clerk
s/George Lange III

ISSUED AS MANDATE. 7/23/98

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

WDNY/rony
93-cv-6387
Telesca

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JUL 16, 1998
CAROLYN CLARK CAMPBELL, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16 day of July one thousand nine hundred and ninety-eight.

Norton,

Plaintiff-Appellee,

v

Dkt No: 97-7928

Sam's Club,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee John C. Norton.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: s/Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

Current through P.L. 105-175, approved 5-11-98

§621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the fact of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their

numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; and

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail to refuse to refer to employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to

discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employee, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace if a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide

employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under > section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, S 6202(b) (3) (C) (I), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American

employers; factor determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership of financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of

the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in -service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a) (3) of this title and section 401(a) (14) (C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a) (3) (B) of this title or section 411(a) (3) (B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal

retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1)

solely because the subsidized portion of any early retirement benefit is disregarded I determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b) (1) (H) of Title 26 and subparagraphs (C) and (D) of section 411(b) (2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b) (1) (H) and 411(b) (2) of Title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24 (B) of this title and section 411(a) (8) (B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d) (2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(1) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f) (2) (B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or

early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (>42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to

age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A) (i), the amount of the deduction available pursuant to subparagraph (A) (i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c) (17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (> 42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each

individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that ocurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a

deduction pursuant to subparagraph (a) fails to fulfill the obligation described in subparagraph (e), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

29 U.S.C. 626. Recordkeeping, investigation, and enforcement.

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this

chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including, without limitation judgments compelling employment, reinstatement of promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction

for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in

such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement

between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity

Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. 630. Definitions

For the purposes of this chapter--

(a) the term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year; Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of

the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor

organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [>29 U.S.C.A. S 151 et seq.], or the Railway Labor Act, as amended [>45 U.S.C.A. S 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council

subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a state government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United

States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [>29 U.S.C.A. S 401 et seq.]

(i) The term "States" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [> 43 U.S.C.A. S 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

29 U.S.C. 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policy making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or

any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a rollover contributions are made.

(d) Repealed. Pub.L. 99-592, S 6(b), Oct. 31, 1986, 100 Stat. 3344.

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings.

(a) JUDGMENT AS A MATTER OF LAW.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the

action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) SAME: CONDITIONAL RULING ON GRANT OF MOTION FOR JUDGMENT AS A MATTER OF LAW.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect

the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.